No. 79-147

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

CITATIONS

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court entered on March 1, 1978 (Pet. App. 4a-12a) is reported at 446 F.Supp. 181. The order entered by the district court on April 28, 1978 (Pet. App. 13a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1979. A petition for rehearing was denied on May 30, 1979 (Pet. App. 3a). The petition for a writ of certiorari was filed on July 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Occupational Safety and Health Act of 1970 (OSHA) provides a private right of action for declaratory and injunctive relief against federal employers.

2. Whether the district court properly dismissed petitioners' common law claim for lack of jurisdiction.

STATEMENT

Petitioners are several groups opposed to smoking and various non-smokers employed by the federal government. They seek declaratory and injunctive relief restricting tobacco smoking to designated work areas in all federal facilities, leaving other work areas free of tobacco smoke for the benefit of non-smoking employees. Petitioners asserted four causes of action in the district court based on: (1) the Occupational Safety and Health Act of 1970 (OSHA); (2) the First Amendment; (3) the Fifth Amendment; and (4) the common law duty of an employer to provide a healthful and safe work place.

The district court, on cross motions for summary judgment and judgment on the pleadings, dismissed petitioners' complaint. The court held that OSHA does not provide federal employees with a private right of action against their employer (Pet. App. 5a-7a) and that petitioners failed to state a claim upon which relief could be granted under either the First or Fifth Amendments (*id.* at 7a-11a).[1] The court also requested further briefing on the issue of its jurisdiction to consider petitioners' common law claim. Subsequently, the court held that it lacked jurisdiction to hear the common law claim and dismissed that portion of petitioners' complaint (*id.* at 13a-15a).

The court of appeals affirmed by judgment order for the reasons stated in the district court's opinion (Pet. App. 1a-2a).

ARGUMENT

1. Petitioners contend (Pet. 5-12) that OSHA, specifically 29 U.S.C. 668(a), contains an implied private right of action for declaratory and injunctive relief against the federal government for unhealthful working conditions. This contention is without merit.

First, it is well established that sovereign immunity prevents the United States from being sued without its consent. *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*,

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[1] Petitioners have not sought review here of the dismissal of their constitutional claims.

312 U.S. 584, 586 (1941). This consent will not be implied but must be "unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957). Nothing in the language or legislative history of Section 668(a) suggests that Congress intended to waive the government's sovereign immunity.

Petitioners also cannot maintain this action against the other federal defendants. Clearly, OSHA does not expressly create a private cause of action. Thus, in determining whether the statute impliedly creates a private cause of action, the courts must consider the factors identified in *Cort* v. *Ash*, 422 U.S. 66 (1975), and further discussed in *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979), and *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979). An assessment of these factors indicates that the district court correctly refused to find a cause of action implied in OSHA on behalf of petitioners.

The first factor identified in *Cort* is whether the plaintiff belongs to a class for whose special benefit the statute was enacted. OSHA is unquestionably intended for the protection of employees, but that fact alone does not suggest the existence of a private right of action. See *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 457-458 (1974). As the Court emphasized in *Cannon* (slip op. 11 n.13), and *Touche Ross & Co.* (slip op. 8), a court must look at the right- or duty-creating language of the statute in determining whether a private cause of action is implicit. In contrast to the cases relied on in *Cannon* (slip op. 11-13

n.13), the language of 29 U.S.C. 668(a) does not confer any rights on federal employees. Rather, it directs federal agencies to establish an occupational health and safety program. Congress' phrasing of the statute in this manner, as "a simple directive" to agency heads, strongly indicates its intent not to create a private remedy. See *Cannon* v. *University of Chicago*, *supra*, slip op. 14-15 n.14; *Touche Ross & Co.* v. *Redington*, *supra*, slip op. 8.

The other *Cort* factors point in the same direction. See *Cort* v. *Ash*, *supra*, 422 U.S. at 78. Petitioners do not claim that anything in the legislative history of OSHA supports their contention (Pet. 8-9). In fact, the legislative history and the entire statutory scheme are decidedly to the contrary. Congress considered and rejected the idea of applying the enforcement system established for private employers to federal agencies, choosing instead to direct the agencies to establish their own safety programs and specifically noting that federal employment "is an area in which ordinary enforcement and penalty provisions are hardly applicable." H.R. Rep. No. 1720, 90th Cong., 2d Sess. 20 (1968).[2]

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[2] Even though not subject to OSHA's enforcement procedures, the federal government has not taken its employee safety responsibilities lightly. The General Services Administration has provided direction to agencies whose buildings it maintains in the form of guidelines entitled "Smoking in GSA Controlled Buildings and Facilities," GSA Bulletin FPMR D-143, 41 Fed. Reg. 44476 (1976). In addition, GSA has recently promulgated regulations, effective April 16, 1979, restricting smoking in federal facilities so as "to pro-

This careful distinction drawn by Congress between private sector and federal employment is an important component of the OSHA statutory scheme, the purpose of which is to provide guarantees of employee safety and health through appropriate standards and enforcement. In providing these guarantees, Congress particularized the responsibilities of federal agencies in 29 U.S.C. 668(a), a provision separate and distinct from the remainder of OSHA, and deliberately refused to subject federal agencies to the coercive compliance measures that are applicable to private employers under 29 U.S.C. 657-659.[3] The manner in which agencies carry out their duties under OSHA is a matter of discretion.[4] Since Congress thus placed the government in a distinct, noncoerced position in the OSHA statutory scheme, it seems clear that Congress did not contemplate the ex-

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vide a reasonably smoke-free environment in certain areas for those working and visiting in GSA-controlled buildings." 44 Fed. Reg. 22464 (1979), revising 41 C.F.R. 101-20.109-10. The Department of Defense has issued its own instructions concerning the control of smoking (No. 6015.18, August 18, 1977, Attachment to Trial Record No. 18), as has the Department of Health, Education, and Welfare (General Administration Manual, Ch. 1-60, Addendum to Brief for Appellees in court of appeals).

[3] The enforcement provisions of OSHA apply to "employers," a defined term that explicitly excludes the United States. 29 U.S.C. 652(5).

[4] The Secretary of Labor has promulgated guidelines for the implementation of OSHA by federal agencies. 29 C.F.R. Part 1960.

posure of federal agencies to private suits by their employees based on mandatory OSHA obligations.

Finally, the subject matter addressed by OSHA indicates that a private federal remedy would be inappropriate. Employee health and safety have historically been subjects of state rather than federal concern, as shown by state tort law and workmen's compensation programs. As petitioners note (Pet. 18), all 50 states and the District of Columbia recognize a duty of employers to provide a safe place of employment. The decision of Congress to establish rules and provide benefits for federal employees does not alter the fact that employment conditions are basically of concern to the states.[5] In *Cannon*, in contrast, the statute dealt with an area traditionally covered by federal law, the prevention of invidious discrimination. Slip op. 29.

Petitioners' contention (Pet. 13-17) that the circuits are divided on the issue raised by this case is incorrect. No court has recognized a private right of action under OSHA. In *Rambeau* v. *Dow*, 553 F.2d 32 (7th Cir. 1977), the court did not ad-

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[5] Petitioners assert (Pet. 12) that a federal right of action is necessary because the Supremacy Clause bars state court injunctive or declaratory relief against the federal government as an employer. But the "necessity" of implying a federal remedy is irrelevant to the central inquiry, the intent of Congress. *Touche Ross & Co.* v. *Redington, supra*, slip op. 14-15. In this case, Congress did not intend to imply a private right of action against federal employers under OSHA. Thus, petitioners have the same options that they had before the passage of OSHA.

dress the question of an implied private remedy under the statute. In *Marshall* v. *Whirlpool Corp.*, 593 F.2d 715 (6th Cir. 1979), pet. for cert. pending, No. 78-1870, the court simply upheld the validity of a government regulation that limits the right of employers to discharge employees who refuse to work because of dangerous conditions. In reaching that conclusion, the Sixth Circuit cited approvingly its earlier decision in *Russell* v. *Bartley*, 494 F.2d 334 (1974), that no private cause of action arises under OSHA. 593 F.2d at 725 n.22. In fact, every court that has considered the issue has agreed that OSHA does not create a private remedy for unsafe or unhealthful working conditions. See *Byrd* v. *Fieldcrest Mills, Inc.*, 496 F.2d 1323 (4th Cir. 1974); *Russell* v. *Bartley, supra; Buhler* v. *Marriott Hotels, Inc.*, 390 F.Supp. 999 (E.D. La. 1974); *Fawvor* v. *Texaco, Inc.*, 387 F.Supp. 626 (E.D. Tex. 1975), rev'd on other grounds, 546 F.2d 636 (5th Cir. 1977); *Skidmore* v. *Travelers Ins. Co.*, 356 F.Supp. 670 (E.D. La.), aff'd, 483 F.2d 67 (5th Cir. 1973). See also *Jeter* v. *St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975); *Hare* v. *Federal Compress and Warehouse Co.*, 359 F. Supp. 214 (N.D. Miss. 1973).

2. Petitioners challenge (Pet. 18-24) the district court's determination that it lacked jurisdiction to hear their common law claim. Petitioners assert (Pet. 21-24) that jurisdiction exists under 28 U.S.C. 1331 because their claim involves an issue of federal

common law.[6] As the district court noted (Pet. App. 14a), however, the issue presented by petitioners is not of unique federal concern and does not require a uniform federal rule. The federal government's involvement in this case is simply as an employer. "As such," the district court observed, "the interest in uniformity among federal agencies in different states is no greater than the same interest as it would apply to a private employer with branches of his business in different states" (*ibid.*). The areas in which the Court has developed a federal common law have involved a complicated federal regulatory scheme, where federal judge-made law is necessary to fill the interstices of the statutory framework. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957). That is not the case here. Hence, petitioners' common law claim does not present a federal question, and the district court was without jurisdiction to hear it under 28 U.S.C. 1331.

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[6] Petitioners' attempt to invoke the mandamus jurisdiction of the district court under 28 U.S.C. 1361 (Pet. 4) was properly rejected by the district court (Pet. App. 14a-15a) and apparently is not renewed here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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